

Justice, the Rule of Law and the Role of the Prosecutor

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Review of Preet Bharara, *“Doing Justice: A Prosecutor’s Thoughts on Crime, Punishment, and the Rule of Law”* (Knopf, 2019)

Preet Bharara, the thoughtful former U.S. attorney for the Southern District of New York, has written an homage to his office and to the Department of Justice. It is provocative and introspective, and an important examination of the work of the remarkable and committed men and women who endeavor to safeguard, deliver and ensure justice. It is also a critical account (and, by that, I do not necessarily mean harsh) of the justice system itself.

“Doing Justice: A Prosecutor’s Thoughts on Crime, Punishment, and the Rule of Law” is written in a way that both an inside audience and a lay audience will savor. Trials and investigations are currently at the forefront of our national discourse, and Bharara does a superb job supplementing that conversation.

Of course, he is not the first to travel this path. What makes his book particularly absorbing—and worth reading—is that, among the many and important successes of his storied office, he also describes the uncertainty, the struggles, the failures and the dilemmas inherent in the work.

For instance, he writes about the “God forbid” problem—the limited ability of human beings to predict the future dangerousness of another human being—a problem that manifests itself not just when judges impose sentence but also when prosecutors decide whether and how to charge a crime. “God forbid” that we get this wrong; that we go too hard, or too soft, or not at all.

What Bharara ably conveys is how those who serve in the Justice Department genuinely love their work, their colleagues and their mission. They are fairly paid in public service, though not overly so. Therefore, a part of their compensation becomes their stories: investigations and trials; victims and criminals; success and failure; compassion and greed. We see the full range of human behavior in all of its messy glory—we see stories. Bharara selects absorbing stories and tells them well.

The book is divided into four sections, generally covering the essential phases of a case: inquiry, accusation, judgment and punishment. As a vehicle to divide the

work, to paint pictures and to share observations, that structure succeeds.

In the “inquiry” section, Bharara writes that investigations are complex and uncertain and that speed is both a friend and an enemy. Automobiles have brakes and accelerators, and safe drivers rely on both. So, too, do good agents and prosecutors. Nor, as Bharara reminds us, are investigations ever as simple as merely “connecting the dots”—a trite phrase that neither describes real investigative work nor the nonlinear fashion in which cases typically unfold.

Bharara introduces us to some of the best investigators with whom he worked: One, Kenny McCabe, reminds us that, unlike some politicians, “if you need to say you’re tough, then you aren’t; if you need to say you are feared, then you aren’t.” And another, John O’Malley, who fortuitously happened upon a letter from an inmate, Eric Glisson, wrongfully convicted and imprisoned for 17 years for the murder of a Bronx taxi driver. O’Malley’s spirited reinvestigation of that crime (he was coincidentally familiar with the underlying case) exonerated an innocent Glisson and brought the actual murderers to justice.

Through McCabe and O’Malley, “Doing Justice” illustrates why it is so important for agents and prosecutors to be “careful and rigorous, even when no one is looking.” Bharara also reminds us—and this is a vital and current lesson—of the need to be humble and to admit the mistakes we all make. Here, he writes about the remarkable case of Brandon Mayfield—an Oregon lawyer, husband and father wrongfully implicated in a horrific terrorist attack in Madrid. The Mayfield and Glisson cases are important to read and digest. In both cases, the system ultimately worked, but not without enormous pain and disruption.

In a chapter on interrogation, Bharara writes about the way in which good investigators conduct interviews and

obtain reliable information—that is the goal, after all. And unlike the failed attempts to coerce information from individuals in certain ignominious settings outside the Justice Department, Bharara knows that reliable information is obtained by good interviewers, who prepare assiduously and attempt to build rapport with the people they interview. That’s the method that actually works.

As historical backdrop, Bharara tells the compelling story of a noted German interrogator who treated U.S. pilots captured during World War II with compassion and kindness, obtaining from them information important to Germany. “Doing Justice” also unspools the FBI’s thoughtful and successful approach to the would-be Times Square bomber and the manner in which a talented Drug Enforcement Administration special agent convinced a high-level drug dealer to talk, bonding with him over the ethnic food they both loved. Those of us who have worked in the Department of Justice know coercive interrogation methods are immoral and ineffective, and that the best interviewers shun those “techniques.”

Indeed, as Bharara points out, a New York investigator named Jimmy Motto was concerned that if a requirement was imposed on law enforcement to videotape interrogations of subjects, jurors might be turned off not because of how harsh the techniques were, but rather because of how gentle they were.

One of the greatest risks with which agents and prosecutors contend are cooperating witnesses (I dislike the term “snitches”). These individuals are routinely other criminals, now incentivized to cooperate, typically in return for some consideration at their own sentencing. Proceed with extreme caution, because liars lie and cheaters cheat, and good investigators know it is vital to corroborate what cooperating witnesses tell them, and then corroborate it again.

Tying themes together, Bharara notes that his office routinely asks cooperators whether they know of anyone wrongly convicted for crimes that the cooperators, themselves, committed. That is apparently a standard part of the debrief of these witnesses, and Bharara reports that his office has played a role in 13 exonerations as a result of asking that simple question. It is a failure of imagination and effort (and perhaps of justice), he writes, not to mandate that question whenever an investigator speaks with a cooperating witness. It is a good point.

In the “accusation” section of his book, Bharara discusses the “life-altering” ramifications of a prosecutor’s decision to charge someone with a crime—a decision that must be made with great deliberation. Sometimes, with the most serious crimes, it is appropriate to charge severely and to seek a significant sentence. Sometimes, of course, it is appropriate to do nothing, even if a crime was committed. As he writes, “[A]ctions have consequences, of course, but inaction has consequences too.”

From my own experience, some of the most difficult—and passionate—debates in my prosecutor’s office focused precisely on those questions: Who do we charge, what do we charge them with, when do we charge and how certain are we that they did what we think they did (or that we can prove it beyond a reasonable doubt)?

Relatedly, Bharara writes about one high-profile public corruption case in his office in which he became concerned that the assigned line prosecutors thought that he—and his leadership team—wanted a particular outcome. He therefore called a meeting to declare that he would be just as proud of his team if, after all of their hard work, they decided that no crime had been committed or that it could not be charged.

That, Bharara writes, is the “walk away issue,” and he illustrates it with a conversation he had with an accomplished state prosecutor about an odd low-level

crime perhaps unique to New York City—individuals sucking tokens out of subway turnstiles. As that state prosecutor noted wryly, if you are willing to do that—to suck a token out of a turnstile—you ought to get to keep it. She had a point. But this small “nuisance” crime well illustrates a larger dilemma—when is it best to take a hard look, discuss the options and walk away?

That resonated with me. As well, though prosecutors do not set out to lose, losing happens, particularly when you go forward on a difficult and vexing case. Again, in my own experience, when a jury acquitted several defendants in a high-profile white-collar prosecution case in my district, I sent an email to my entire office commending the prosecutors and the agents for their hard work and perseverance during a long and difficult investigation and prosecution. The fact that a jury saw the case differently than we did not detract from the professionalism or diligence of that talented trial team.

We may have made the wrong judgment about the quantum of proof we had, or how it would be received by jurors, or how it would hold up under cross-examination. We may well have misjudged the strength of our case. To be clear, in my email, I was not asking our prosecutors to lose cases, but I was reminding them that this is a hard business, that acquittals happen, and that there is no shame in it as long as we proceed diligently and in good faith.

By the same token—and this is my aside—it is crucial for law enforcement never to be driven by a quest for statistics or to run up the numbers. Telling agents that we need more arrests or wiretaps, or telling prosecutors that we need more indictments or severe sentences, introduces all sorts of perverse and unintended behavior into the system. We produce justice (or at least we try), not widgets, and so demanding higher numbers year after year is appropriate for the widget maker but deeply dangerous in law enforcement. Bharara would agree.

Bharara writes about one humorous case in which his office wrestled over a charging decision for a gentleman who escaped from a minimum-security federal prison for a brief conjugal visit with his wife. He was caught trying to break back into the prison. You read that right—he was breaking back in. Bharara’s office presented the case to a grand jury, which refused to indict the man (an admittedly rare occurrence). A fair question—which Bharara does not answer—is why this case was even presented to a grand jury for its consideration. But the amorous escapee and the token sucker both illustrate the vagaries of the work.

In the “judgment” section of his book, Bharara movingly writes about a bipolar, drug-addicted prostitute with a lengthy criminal record who was beaten and robbed, and wants her day in court to see that justice is done to her assailant. Though prosecutors and a Bronx detective believe her, they lack the evidence they feel necessary to charge the case until a remarkable break yields compelling evidence. With that, and the victim’s testimony, the robber is convicted at trial. In her thanks to the prosecution team, the victim tearfully noted that nobody had ever before “taken [her] seriously.” Comforting and caring for victims is a crucial part of the job.

Bharara also writes of what it is like to wait for a jury verdict, and to receive it in open court. It is an incredibly tense and difficult moment—first and foremost for the defendant and his or her family, but also for the prosecution team and, I imagine, for the judge and jury. For those who have participated in this rite, as I have many times, Bharara is spot on. For those who have not, he does a wonderful job conveying the anxiety, drama and majesty of that process: “The moment of conviction is the most somber and sobering moment in civilian civic life. There is nothing else like it It is grave and sad, even if just.”

Finally, in the “punishment” section of the book, the prose turns more somber. Bharara recounts the story of Baby Carlina—a woman kidnapped as a newborn from a hospital—who discovers her own identity and her true, grieving, biological family as a young adult. What is the appropriate punishment for the kidnapper, who raised Carlina as her own child? What did the kidnapper take from Carlina and from her real parents? How do we think about crime and punishment and justice for offenders and victims in a system that strives to be perfect but occasionally falls short?

When Bharara was a new line federal prosecutor in the Southern District of New York, he was instructed to “[d]o the right thing, in the right way, for the right reasons.” In turn, when he served as the U.S. attorney for that district, he gave that same advice to the men and women he hired.

“Doing Justice” depicts that ideal and that aspiration, as prosecutors, agents, officers, judges, victims, lawyers and citizens strive to do justice. It also depicts the uncertainty and fallibility of these same good people struggling to make lots of hard decisions and to get them all correct. As one judge in front of whom I practiced often stated, a defendant is entitled not to a perfect trial but to a fair trial. Yet, perfection remains the goal—a worthy but elusive goal. “Doing Justice” is a consistently compelling and important tale, well written and well worth reading.

Chuck Rosenberg is a former U.S. attorney, senior FBI official and chief of the Drug Enforcement Administration.

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